NO. 94592-6

SUPREME COURT
OF THE STATE OF WASHINGTON

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA, AND MARRIETA JONES, individually, and on behalf of all similarly-situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco, d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO, d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his official capacity as an agent and officer of Lourdes Medical Center,

Respondents.

AMICI CURIAE BRIEF OF WASHINGTON STATE HOSPITAL ASSOCIATION AND ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS

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I. INTRODUCTION

This case is part of a wave of wage and hour lawsuits filed against hospitals and large healthcare systems in Washington and across the country, requesting class certification for claims of missed and unpaid rest and/or meal breaks. The overwhelming majority of courts have denied certification both because such claims across the many different units or departments that constitute a hospital do not involve common answers to questions whether breaks or meals have been "missed," and because "class" fact-finding does not predominate over individualized inquiries. Petitioners' suggestion to the trial court that it could proceed with eighteen or more subclasses highlights the individual nature of the claims against Lourdes Medical Center ("Lourdes").

As a matter of Washington law, staffing decisions, including implementing rest and meal breaks, occur at the department level and are tailored to each particular practice environment. For example, outpatient and inpatient surgery departments are almost entirely scheduled, very unlike an emergency department. The scheduled services make it much easier for nurses to schedule breaks. On-call services, such as intravenous therapy nurses, may have substantial down time in-between demands for their services. Procedural units, such as radiology, may schedule breaks between procedures. Night shifts, when most patients sleep, provide

greater flexibility for nurses to take breaks than during the day when patients are awake and family members visit. Moreover, it is routine for the number of patients receiving health care (the patient "census") to fluctuate from day to day and unit to unit, such that the workload facing nurses and other health care workers is unpredictable. The localized implementation of break policies in each department and in each shift, along with myriad other differences in the nurses' work settings, mean that there is no common contention that is capable of class-wide resolution in a single stroke.

While petitioners advance common statutory claims, the differences among nurses, shifts, and departments would make it impossible for a trier of fact to fairly determine liability on the basis of representative evidence. The only fair way to try petitioners' rest and meal break claims is to permit Lourdes to assert its individual defenses against each putative class member. That would result in 100 mini-trials on liability alone, the antithesis of the purpose of a class action.

Washington hospitals are similar to those around the country. This case is no different than other hospital "missed" rest or meal break cases, and the trial court's and court of appeals' decisions should be upheld.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

Washington State Hospital Association ("WSHA") is a nonprofit membership organization representing Washington's 107 community hospitals. WSHA seeks to improve the health of Washington residents through its involvement in all matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. Its programs include support for indigent care, innovation in health service delivery and improved access to medical services.

WSHA's members include urban and rural hospitals, general and special care hospitals and public and private hospitals.[1] Members employ more than 109,000 people and provide care during 648,000 inpatient and 12.5 million outpatient visits. Members in critical access and rural areas primarily serve vulnerable populations – the payor mix for such facilities, which operate on smaller operating margins (averaging between 1-3%), consists of over 70% Medicaid and Medicare patients.

Washington has over fifty public hospital districts, many serving rural Washingtonians. The Association of Washington Public Hospital Districts ("AWPHD") has served Washington's public hospital districts since 1952. Each member public hospital district is created under Chapter 70.44 RCW and governed by publicly-elected commissioners. AWPHD

[1] 101 of WSHA's 107 members are public or nonprofit hospitals.

provides educational services and opportunities to its members, training programs and a comprehensive legal manual for public hospital districts. AWPHD provides members with updates of changes in state and federal law likely to impact public hospital districts.

Amici recognize the critical role their nurses play in providing quality patient care and the need for a healthy work environment. However, where a hospital's wage and hour policies comply with the law and the hospital does not have an unwritten, uniform "policy" to violate the lawful policies, claims such as those present in this case should not be decided on a class-wide basis.

With respect to the decision under review, *Amici* support affirmance because the court of appeals correctly determined that class resolution of the claims presented was not *superior* to other means of resolution and because the trial court correctly determined that common questions did not predominate over individual questions. Further, contrary to both petitioners' and *amicus* Washington Employment Lawyers Association's ("WELA") assertions, a trial court *should* consider (but not seek to resolve) the merits of putative class claims when ruling on a CR 23 motion. Finally, the standard of review for CR 23 determinations is, and should remain, abuse of discretion for both certification and non-

certification. The Court should reject *amicus* WELA's request to re-write CR 23 on an *ad hoc* and result-oriented basis.

III. ISSUES OF CONCERN TO *AMICI CURIAE*

Amici address the following issues:

A. Whether the trial court and court of appeals decisions that the class should not be certified are consistent with the "weight of authority" among federal cases ruling on Rule 23 motions in the context of wage and hour claims in large healthcare systems.

B. Whether the trial court and court of appeals properly determined that petitioners failed to meet the requirements of CR 23(b)(3).

C. Whether it is proper for a trial court to look beyond the pleadings and consider the evidence relating to putative class claims when ruling on a CR 23 motion.

D. Whether the Court should continue to apply the substantial deference standard of review even-handedly to both denials and grants of class certification.

IV. STATEMENT OF THE CASE

Amici rely on Respondent's statement of the case.

V. ARGUMENT

A. The wide differences in nursing practice across departments in hospitals and medical systems will usually require individual testimony to determine if a nurse missed a meal or rest break and did not get paid for the work performed. Courts across the country have recognized that class-based resolution of these kinds of claims is improper.

There are no reported Washington cases analyzing class certification for claims of missed rest or meal breaks by employees of large health care organizations with multiple departments. But federal cases, representing the "weight of authority,"[2] overwhelmingly reject class status for claims involving missed meal and rest breaks for nurses due to the widely varying facts inherent in large health care systems.[3] Department-level implementation and different nurse experiences repudiated class status.

For example, in *Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22, 50 (W.D.N.Y. 2014), the plaintiffs asserted commonality, but

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[2] In *Oda v. State*, 111 Wn. App. 79, 100, 44 P.3d 8 (2002), the court of appeals expressly relied on federal class action decisions, noting "[t]he weight of authority indicates that in a large, decentralized university, where departments have great autonomy in personnel decisions, class action treatment for a disparate treatment case is inappropriate." The court held that "[t]he University of Washington fits into the model of the decentralization cases" and reversed the order granting certification. *Id.*

[3] Only three cases, all issued by the same court on the same day, have certified missed break class actions for hospitals where there was no unlawful policy or practice uniformly applied. *See Meyers v. Crouse Health Sys.*, 274 F.R.D. 404 (N.D.N.Y. 2011), *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385 (N.D.N.Y. 2011), and *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 275 F.R.D. 75 (N.D.N.Y. 2011). The court's reasoning has been uniformly rejected by other federal courts. *See, e.g., Gordon v. Kaleida Health*, 299 F.R.D. 380, 404 (W.D.N.Y. 2014); *Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22, 51 (W.D.N.Y. 2014); *Creely v. HCR ManorCare*, 920 F. Supp. 2d 846, 856 (N.D. Ohio 2013); *Jarosz v. St. Mary Med. Ctr.*, No. 10-3330, 2014 WL 4722614 at *10 n.6 & *11 n.7 (E.D. Pa. Sept. 22, 2014).

> the evidence shows the opposite – specifically, that Defendants delegated authority to department managers within each hospital to determine how to implement Defendants' policies, including developing department-specific procedures related to the automatic deduction policy. In particular, managers implemented policies and practices to address how to schedule meal periods, where employees may take their meal periods, how employees are relieved from duty for their meal periods, whether employees may take assigned cell phones or pagers with them on their meal periods, whether supervisory permission is required to take a meal period, and how employees record time worked.[4]

In *Roth v. CHA Hollywood Med. Ctr.*, No. 2:12-CV-07559, 2013 WL 5775129 (C.D. Cal. Oct. 25, 2013), nurses testified to varied experiences with breaks, some experiencing problems and others not. The widely varied experiences and explanations precluded commonality. *Id.* at *2, *6. A hospital is not liable where a nurse fails to follow its reasonable timekeeping policy, thwarting its ability to pay for missed breaks and comply with the law.[5]

Even under the lesser certification standard in federal Fair Labor Standards Act ("FLSA") collective action claims,[6] courts find that in the

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[4] *Quoting Camilotes v. Resurrection Health Care*, 286 F.R.D. 339, 351 (N.D. Ill. 2012); *accord Desilva v. N. Shore-Long Island Jewish Health Sys.*, 27 F. Supp. 3d 313, 317-18 (E.D.N.Y. 2014)

[5] "[I]f an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." *White v. Baptist Mem'l Health Care*, 699 F.3d 869, 876 (6th Cir. 2012).

[6] Rule 23(b)'s predominance requirement is more stringent than the "similarly situated" requirement under the FLSA. *Frye v. Baptist Mem'l Hosp.*, 495 F. App'x 669, 672 (6th Cir. 2012). Thus, plaintiffs unable to meet the "similarly situated" requirement are also unable to meet the predominance requirement, and courts that decertify FLSA collective

context of large health care systems, certification of missed break claims is not proper where plaintiffs cannot identify an employer's policy or system-wide practice that violates the law.[7]

"Because CR 23 is identical to its federal counterpart, cases interpreting the analogous federal provision are ***highly persuasive***." *Schnall v. AT&T Wireless Servs.*, 171 Wn.2d 260, 271, 259 P.3d 129 (2011) (internal quotation marks and citations omitted) (emphasis added).[8] The court of appeals has similarly relied on federal decisions on certification.[9]

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actions uniformly deny class certification. *See, e.g., Desilva*, 27 F. Supp. 3d 313; *Camilotes*, 286 F.R.D. 339; *Kuznyetsov v. W. Penn Allegheny Health Sys.*, No. 10-948, 2011 WL 6372852 (W.D. Pa. Dec. 20, 2011).

[7] *See, e.g., Bell v. Reading Hosp. & Med. Ctr.*, No. 13-CV-05927, 2016 WL 3902938 at *9-*13 (E.D. Pa. July 19, 2016); *Jarosz v. St. Mary Med. Ctr.*, No. 10-3330, 2014 WL 4722614 at *7-*11 (E.D. Pa. Sept. 22, 2014); *Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846, 852-54 (N.D. Ohio 2013); *Cook v. St. John Health*, No. 10-10016, 2013 WL 12231776 at *2 (E.D. Mich. May 29, 2013); *Camilotes v. Resurrection Health Care Corp.*, 286 F.R.D. 339, 346-52 (N.D. Ill. 2012); *Kuznyetsov v. W. Penn Allegheny Health Sys.*, No. 10-CV-948, 2011 WL 6372852 at *8 (W.D. Pa. Dec. 20, 2011); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2011 WL 6372873 at *2-*11 (W.D. Pa. Dec. 20, 2011); *Blaney v. Charlotte-Mecklenburg Hosp. Auth.*, No. 3:10-CV-592, 2011 WL 4351631 at *6-*11 (W.D.N.C. Sept. 16, 2011); *White v. Baptist Mem'l Health Care Corp.*, No. 08-2478, 2011 WL 1883959 at *7-*14 (W.D. Tenn. May 17, 2011), *aff'd*, 699 F.3d 869 (6th Cir. 2012); *Cason v. Vibra Healthcare*, No. 10-10642, 2011 WL 1659381 at *2-*3 (E.D. Mich. May 3, 2011); *Frye v. Baptist Mem'l Hosp.*, No. 07–2708, 2010 WL 3862591 at *3-*10 (W.D. Tenn. Sept. 27, 2010), *aff'd*, 495 Fed. Appx. 669 (6th Cir. 2012).

[8] In *Schnall*, this Court relied on over 50 federal cases in reaching its decision, 171 Wn.2d at 271-73, and noted that the court of appeals "reached a conclusion that flies in the face of this 'highly persuasive' federal law." *Id.* at 271. Since the *Schnall* decision, two amendments to CR 23 have left subsections (a) and (b) unchanged. The federal rule has not been amended during that time.

[9] *See, e.g., Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168-73, 151 P.3d 1090 (2007); *Sitton v. State Farm Mut. Auto. Ins.*, 116 Wn. App. 245, 252-55, 258-59, 63

The variables identified by the federal courts are, if anything, accentuated in Washington. As a matter of law, hospitals must plan their staffing at the level of each individual "patient care unit" and shift. RCW 70.41.420(3)(a). Recent action by the Legislature clarifies that planning for staffing must consider those times when nurses are relieved for meal and rest breaks. Ch. 249, Laws 2017, § 2 (amending RCW 70.41.420, adding subsection (3)(a)(ix)). The federal courts' uniform rejection of hospital-wide meal and rest break class action litigation is plainly appropriate in Washington.

B. The record below, including nurses' testimony regarding significant differences among medical departments and shifts, makes clear that numerous mini-trials would be necessary. The need for numerous mini-trials is fatal to satisfying CR 23(b)'s predominance prerequisite, and also undercuts the "superiority" of using a class device to resolve these wage claims.

"Class actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with the requirements of CR 23." *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974); *see also Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). If plaintiffs satisfy their burden of meeting the requirements of CR 23(a), they "must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual

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P.3d 198 (2003); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820-28, 64 P.3d 49 (2003); *Oda v. State*, 111 Wn. App. 79, 89-94, 100-103, 44 P.3d 8 (2002).

issues *predominate* over individual issues and that a class action is an otherwise superior form of adjudication." *Schnall*, 171 Wn.2d at 269 (emphasis in original).

The predominance inquiry requires a court

> to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[10]

As one example, petitioners' rest break claim requires proof that nurses did not receive a 10-minute rest break for each four hours worked. WAC 296-126-092(4). If nurses have a sum of ten minutes of "intervals of short duration in which [they] are allowed to relax and rest, or for brief personal inactivities from work or exertion," they have received "intermittent rest periods" that comply with the rest break requirement. WAC 296-126-092(5); Dep't of Labor & Indus. Admin. Policy No. ES.C.6 at 4-5. Many witnesses testified that nurses had varying levels of downtime to engage in non-work activities. For example:

> In the OB department, RNs typically have a significant amount of downtime in any given month. There are hours and even days when there are no patients in the unit. . . . A couple times a month, there is a spike in the number of deliveries and patient

[10] *Tyson Foods, Inc. v. Bouaphakeo*, __ U.S. __, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016) (*quoting* 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012)) (alteration in original).

> care required in the unit. Even during these busy times, the RNs in the labor and delivery unit can take breaks from work in small increments (5 minutes or so) throughout the day to chat about personal matters, surf the internet, use their personal cell phones, check email, read a magazine, and grab a snack throughout the shift. I observe this on every shift I work.[11]

Whether some or all of the nurses received legally adequate intermittent rest periods is not susceptible to common proof; the individualized inquiry required to establish liability would predominate over the "common" legal theory that Lourdes did not comply with the rest break requirements of WAC 296-126-092(4).[12]

Petitioners acknowledge that factual differences exist for the nurses' alleged damages, but claim that any difficulties can be dealt with by certifying a class for liability only. Pet. for Rev. at 13, 15-16. Without an unlawful policy or practice applied uniformly to all putative class members, however, the questions of liability and damages are intertwined. "[T]the individualized inquiry necessary to establish the amount of each employee's damages is the same individualized inquiry necessary to establish the employer's liability to that employee." *Enriquez v. Cherry*

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[11] CP 1941-42. *See also* CP 397, 493, 1686, 1690-91, 1694-95, 1698, 1701-02, 1814-17, 1821-22, 1829, 1832-33, 1847, 1853, 1866, 1877, 1896, 1913, 1918, 1924-25, 1955, 1977-78.

[12] Even petitioners' novel "abandonment" theory, based on WAC 246-840-710(5)(c), requires individualized proof that "continued nursing care is required" by the patient's condition. For some patients, any departure from ongoing, active treatment might constitute abandonment, but that cannot be determined on a class-wide basis. The "abandonment" theory would also not apply to the many nurses who have no patient care duties during a shift. *See, e.g.,* CP 70-71, 492, 1858, 1895-96, 1924, 1941-42, 1977.

Hill Mkt. Corp., 993 F. Supp. 2d 229, 237 (E.D.N.Y. 2013) (certification of wage claim denied). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.' " *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1192 (9th Cir. 2001).

Petitioners have not demonstrated that the questions they raise will generate common class-wide answers, let alone that these questions predominate over the myriad individualized inquiries presented by the facts of this case. Nurses in departments with no patients for all or part of a day have "downtime" to rest,[13] even if a nurse in a different department doesn't that day. Surgical nurses have scheduled breaks between surgeries and are relieved from duties.[14] Petitioners' approach leaves a court in the untenable position of either holding countless mini-trials or depriving a hospital defendant of its due process right to present its full defense. *See Desilva*, 27 F. Supp. 3d at 328. "[T]he class action procedural device may not be used to abridge a party's substantive rights." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 34, 325 P.3d 916, 172 Cal. Rptr. 3d 371 (Cal. 2014).

For example, petitioners posit as a common policy or practice that

[13] *See, e.g.,* CP 492 (testimony of plaintiff Chavez), 1690, 1978.

[14] *See, e.g.,* CP 1830, 1858, 1870, 1899 (missed breaks a rarity and fully compensated).

Lourdes allows only one meal break per 12-hour shift. Even if such a policy or practice exists, however, it cannot apply uniformly to petitioners' putative class members – "all registered nurses who worked at least one hourly shift" – because many nurses worked only eight- or ten-hour shifts. Petitioners' proposed method of dealing with the lack of commonality across all putative class members – certifying 18 subclasses (nine departments, each divided between nurses with 12-hour shifts and those with other shifts), CP 1590-91 – provides a textbook example of unmanageability. Petitioners' proposed method also calls into question whether each subclass would meet CR 23(a)(1)'s numerosity requirement (the proposed class, including all departments and all shifts, includes only about "100 current and former nurses," CP 1593). Testimony also showed significant differences between day and night shifts and the amount of time available for nurses to take breaks. CP 1698, 1831, 1925, 1976-78. Subclasses to address these differences necessitates even more mini-trials.

Charge nurses are staff nurses, not managers. CP 911. They implement break procedures on shifts where they take on charge nurse duties (for additional pay). CP 549, 694, 707, 800-01, 1900 (nurse provides coverage for breaks as directed by charge nurse), 1911, 1983. How a unit operates on any given day is partly determined by the charge nurse. CP 484. Petitioners assert failures by some charge nurses in

ensuring that other class members receive their breaks. CP 550, 577 (charge nurse Ingraham interfered with breaks), 1436. Other charge nurses always made sure nurses received meal and rest breaks. CP 1914. There are internal class conflicts. Class members who served as charge nurses are simultaneously seeking recovery, while other class members point to them as a cause of their injury. A hospital-wide class with inherent, internal conflicts is not superior to other litigation options.[15]

C. The rigorous analysis required under CR 23 means a trial court must look beyond the pleadings and consider the merits of putative class claims.

Both petitioners and *amicus* WELA assert that the trial court should not have considered the merits in determining class certification. This is contrary, however, to the "rigorous analysis" required when determining whether Rule 23's prerequisites are met. *Oda*, 111 Wn. App. at 93.

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . ." *Wal-Mart*, 564 U.S. at 350. "The party must also satisfy ***through evidentiary proof*** at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (emphasis added). This "[f]requently . . . will entail

[15] The impact of different charge nurse conduct on whether a nurse missed rest or meal breaks on a shift is another example of individualized fact-finding that makes class resolution of the claims improper.

some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351.

Petitioners and *amicus* WELA appear to argue that a trial court must accept as true plaintiffs' bare, unsupported allegations, citing three cases in support: *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999),[16] *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003),[17] and *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir. 1995).[18]

Epstein has nothing to do with considering the merits of class claims; instead, it involved a post-settlement, collateral attack on a certification decision: "due process does not require collateral second-guessing of those determinations and [appellate] review." *Epstein*, 179 F.3d at 648. Similarly, *Schwarzschild* does not address whether courts may consider the merits when rigorously analyzing compliance with Rule 23. It addressed the effect of summary judgment, noting that "courts ***generally do not*** grant summary judgment on the merits of a class action until the class has been properly certified," *Schwarzschild*, 69 F.3d at 295, and

[16] Pet. for Rev. at 19 n.29; Supp. Br. at 19 n.35.
[17] *Amicus* WELA Memo. at 8.
[18] *Id.*

holding that "when defendants obtain summary judgment" under those circumstances, the "decision binds only the named plaintiffs." *Id.* at 297.[19]

Schwendeman's statement that a court "should not conduct a preliminary inquiry into the merits" does not support petitioners' and *amicus* WELA's position. The court noted the "difference between considering all the evidence in the record . . . and weighing conflicting testimony. The trial court is free to do the former . . . but may not do the latter." *Schwendeman*, 116 Wn. App. at 26 n.44.[20]

In *Oda*, the court of appeals rejected the trial court's reasoning that "I am not to decide the merits. I am to, in effect, take the substantive evidence as it's pleaded, unless it is so unreasonable that it can't be true, or unless there is something directly refuting." 111 Wn. App. at 93. Instead, " '[g]oing beyond the pleadings is necessary, as a court must

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[19] Petitioners' and *amicus* WELA's argument that the trial court improperly requested the parties to file motions for summary judgment before ruling on certification has already been rejected by this Court. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn. 2d 790, 807, 123 P.3d 88 (2005) ("It is clear . . . that a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions."). In any event, here petitioners had *already* filed a dispositive motion *before* the trial court made the request. VRP 125:19 – 126:7.

[20] *Schwendeman*'s statement is based on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). As noted in *Wal-Mart*, courts sometimes mistakenly cite *Eisen* to support a prohibition on merits-based inquiry: the trial court in *Eisen* "had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that . . .), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants." *Wal-Mart*, 564 U.S. at 351 n.6. To the extent *Eisen*'s statement "goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases." *Id.*

understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.' " *Id.* at 94 (*quoting Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)).

Here, not only did the petitioners fail to meet the CR 23(b) requirements, they failed to show commonality under CR 23(a)(2). Commonality "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart*, 564 U.S. at 350. It is not enough to merely allege "the class members have all suffered a violation of the same provision of law." *Id.*[21] Instead, the claims "must depend upon a common contention . . . that is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, the individualized inquiries required to determine whether potential class members worked through meal and/or rest breaks and were not paid for their work preclude a finding of commonality.

Petitioners may argue that the "stringent requirements for certification"[22] expressed in *Wal-Mart* do not apply to wage and hour class

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[21] *See also Miller*, 115 Wn. App. at 824 ("Certification under CR 23(a)(2) is not justified merely because class members share a legal theory of recovery.").

[22] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 133 S. Ct. 2304, 2310, 186 L. Ed. 2d 417 (2013).

actions. Federal courts, however, regularly apply *Wal-Mart* to wage and hour cases.[23] More specifically, *Wal-Mart* is regularly applied to wage and hour cases involving large hospital systems, where plaintiffs are required to show, not merely plead or take for granted, that individualized member-level fact-finding is unnecessary to resolve the claims' merits.[24]

Wal-Mart refocused and sharpened the lens through which a trial court must examine whether plaintiffs have demonstrated the commonality prerequisite under Rule 23(a)(2), an impact plainly manifested by the number of certifications overturned in its wake.[25] *Amici* urge the Court to determine that for rest and meal break wage claims in the context of large health care systems, commonality under CR 23(a)(2) cannot be met unless there is an unlawful policy or practice that is uniformly applied.

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[23] *See, e.g., Suvill v. Bogopa Serv. Corp.*, No. 11-CV-3372, 2014 WL 4966029 at *9 (E.D.N.Y. Sept. 30, 2014); *Gonzalez v. Millard Mall Servs.*, 281 F.R.D. 455, 461-64 (S.D. Cal. 2012); *Coleman v. Jenny Craig, Inc.*, No. 11-CV-1301, 2013 WL 6500457 at *9-11 (S.D. Cal. Nov. 27, 2013); *Fernandez v. Wells Fargo Bank, N.A.*, No. 12-CV-7193, 2013 WL 4540521 at *6-7 (S.D.N.Y. Aug. 27, 2013); *In re Taco Bell Wage & Hour Actions*, No. 1:07-CV-1314, 2012 WL 5932833 at *5-7 (E.D. Cal. Nov. 27, 2012); *Romero v. H.G. Auto. Grp.*, No. 11-CV-386, 2012 WL 1514810 at *18 (S.D.N.Y. May 1, 2012); *Hughes v. WinCo Foods*, No. 11–00644, 2012 WL 34483 (C.D. Cal. Jan. 4, 2012); *York v. Starbucks Corp.*, No. 08-07919, 2011 WL 8199987 at *23 (C.D. Cal. Nov. 23, 2011); *Gales v. Winco Foods*, No. 09-05813, 2011 WL 3794887 (N.D. Cal. Aug. 26, 2011).

[24] *See, e.g., Desilva*, 27 F. Supp. 3d at 317-18; *Hinterberger*, 299 F.R.D. at 48-51; *Camilotes*, 286 F.R.D. at 351; *Roth*, 2013 WL 5775129 at *6-7.

[25] *See, e.g., EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372 (3rd Cir. 2013); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 974 (9th Cir. 2011).

D. Deference to a trial court's determination of the suitability of a case for class resolution should not depend on the result. CR 23's prerequisites exist to protect parties and the integrity of the judicial system.

Petitioners and *amicus* WELA argue that the court of appeals erred in viewing the evidence "in a light most favorable to Lourdes." Even if the court of appeals erred in this portion of the decision, it is a red herring issue. This Court need not adopt the position to affirm.

As petitioners point out, nowhere did the trial court resolve evidentiary conflicts. For the purposes of class certification, however, *resolving* conflicting evidence is unnecessary as well as improper. Instead, the trial court properly determined that the very existence of the numerous, individualized factual disputes make the case wholly inappropriate for class treatment. CP 997; VRP 406-07.[26]

There is no different level of deference for a denial of certification than for a grant of certification. "When this court reviews a trial court's decision to deny class certification, that decision is afforded a substantial amount of deference." *Schnall*, 171 Wn.2d at 266. The burden is on plaintiffs to prove that they meet the requirements of CR 23. *Id.* at 269. The burden is not lessened merely because they assert a wage claim.

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[26] "In other words, even assuming a manager improperly disapproved payment for time that was actually worked for [the hospital's] benefit, while that violation may beget a claim for an individual employee, it does not support class treatment." *Desilva*, 27 F. Supp. 3d at 329.

The Court should reject *amicus* WELA's invitation to abandon Washington's rule in favor of the so-called federal "practice" to give "more deference to a trial court order granting class certification than to one denying certification."[27] The "practice" is *dicta* unsupported by analysis, but is rather based on a misreading of Judge Friendly's opinion in *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983), in which he stated that "[a]buse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance" because "courts have built a body of case law with respect to class action status."[28] Washington courts have not misread the *dicta* and should not do so now.

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[27] *Amicus* WELA Memo. at 3; *Amicus* WELA Brief at 5-6.

[28] A review of the citations to authority demonstrates that a misreading of Judge Friendly's opinion is the source of *amicus* WELA's assertion that courts should give more deference to an order granting class certification. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016) (*citing Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 956 (9th Cir. 2013)) (*quoting Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1171 (9th Cir. 2010)) (*quoting In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008)) (*citing Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 225 (2d Cir. 2006)) (*citing Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003)) (*quoting Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999)) (*quoting Lundquist v. Security Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993)) (*citing Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)) (*citing Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983)). The *dicta* in *Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 464 (2d Cir. 2013) has the same source.

VI. CONCLUSION

For the reasons stated above, *Amici* WSHA and AWPHD urge the Court to affirm the denial of class certification.

Respectfully submitted this 4th day of December, 2017

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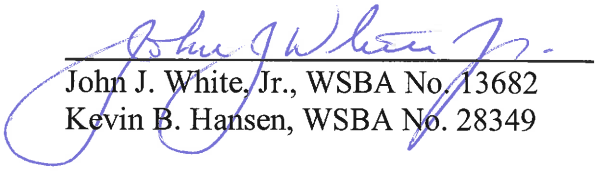

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The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I e-filed the original of this document with the Supreme Court, and e-mailed to the attorneys listed below and mailed, postage prepaid thereon, via regular U.S. Mail, a copy of this documents to the following attorneys:

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